

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

FELIPE FOWLKES,	)	
Plaintiff,	)	
	)	C.A. No. 05-11749-JLT
v.	)	
	)	
KATHLEEN M. DENNEHY, ET AL.,	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

TAURO, D.J.

Now before this Court are various pending matters. Upon review of the record, the following Order is hereby made:

1. The Defendant's Motions to Dismiss (##52, 59)

Defendant Anderson has filed both a Motion to Dismiss (#52) and an Amended Motion to Dismiss (#59) based on failure to effectuate service under Fed. R. Civ. P. 12(b)(5). It appears Plaintiff mailed his proof of service on June 1, 2007, although the Court did not receive the filing until June 7, 2007. See Proof of Service (#58). The Court credits a good faith attempt by Plaintiff to comply with this Court's Memorandum and Order (#57) with respect to proof of service. Therefore Defendant's Motion to Dismiss (#52) and the Amended Motion to Dismiss (#59) are both DENIED without prejudice.

2. Dismissal of Defendant Martin

Although Plaintiff initially indicated that he did not object to the dismissal of Defendant Martin (who is deceased), see Proof of Service (#58), he apparently has changed his mind and has now filed a show cause Response (#65) indicating that he

does, in fact, object to the dismissal of Defendant Martin. He alleges that Martin acted under color of state law when he used force against him in 2004, and he asserts that "the state" is liable for his actions regardless of whether Martin is deceased or not. However, Plaintiff has not shown that he effectuated service on Martin before his demise, nor has he sought to substitute the authorized representative of Martin's estate as a Defendant. Rather, Plaintiff's response is directed solely to the liability of "the state," and not the liability as to Defendant Martin. Moreover, to the extent that Plaintiff is asserting a claim against the "state" (or the Department of Corrections for that matter) based on a *respondeat superior* theory of liability (*i.e.*, because the state is the employer), such claim is not cognizable because (1) the state is not named as a party to this action; (2) the state is entitled to sovereign immunity from a damages claim; (3) the state is not a "person" under § 1983; and (4) there is no *respondeat superior* liability under § 1983.

Accordingly, the Court finds the show cause response (#65) to be deficient. Therefore, it is hereby Ordered that Defendant Martin is dismissed as a party to this action, without prejudice. Finally, to the extent Plaintiff is attempting to assert a new claim against the state, his show cause response is not the proper vehicle to do so. He must seek leave to file a Third Amended Complaint to assert the claim against the state, in compliance with the Court's Local Rules, or he must file a

separate civil action (and comply with the fee requirements for a new civil action).<sup>1</sup>

3. Motion for Extension of Time to July 31, 2007 to File Definite Statements (#62)

Plaintiff filed a Motion for an Extension of time to July 31, 2007 to File Definite Statements (#62) seeking additional time to prepare the response in accordance with this Court's Order, on the grounds that he has limited access to the library and legal supplies, he is being held in administrative segregation, and he is litigating three cases *pro se*.

On June 20, 2007, Plaintiff filed his More Definite Statement (#68).

Accordingly, Plaintiff's Motion for an Extension of time to July 31, 2007 to File Definite Statements (#62) is hereby DENIED as moot.

4. Motion to Dismiss Pursuant to Fed. R. Civ. P. 41(B)

As noted above, Plaintiff's More Definite Statement (#68) does not comport with this Court's Memorandum and Order (#57). The pleading is in excess of 90 pages, contains paragraphs which are pages long, and fails to provide in any meaningful fashion, the type of information necessary for the Defendants to file a meaningful response. In short, the pleading is not in compliance with this Court's prior Memorandum and Order (#57) directing

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<sup>1</sup>If Plaintiff files a motion for leave to amend the complaint, he must demonstrate why such amendment would not be futile, in light of the apparent lack of a cognizable claim, as noted above.

Plaintiff to file a brief chart. Defendants have filed a motion to dismiss on these grounds.

This Court was well aware of Plaintiff's proclivity to file voluminous and unorganized pleadings, and thus specifically set the parameters of the response expected from him, in order to put this case in a posture to reach the merits of this action. While the Court is disturbed by the lack of compliance with the directives, dismissal of this action at this juncture is deemed to be a draconian measure. However, Plaintiff's More Definite Statement (#68) is hereby STRICKEN. The Court will permit Plaintiff one further opportunity to file a More Definite Statement in accordance with the Memorandum and Order (#57). It is hereby Ordered that within 30 days of the date of this Memorandum and Order, Plaintiff shall file a brief chart containing the relevant information as previously directed.<sup>2</sup> The document shall not exceed seven (7) pages.

Plaintiff is warned that strict compliance with this directive is mandated, and he will not get a third bite at the apple, nor will the Court permit any extensions of the 30 day

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<sup>2</sup>While the Plaintiff need not use a particular format to comply with these directives, the Court suggests the following chart may be used as a template.

Name of Defendant	Cause of Action	Date of Action	Place of Action	Brief Description of Event
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deadline, nor any further opportunities to amend the More Definite Statement by asserting any additional claims or parties not contained in the operative complaint in this action.<sup>3</sup>

Plaintiff is also advised that failure to comply with these directives will result in a dismissal of this action with prejudice, as a sanction.<sup>4</sup>

In light of the above, the Court DENIES Defendants' Motion (#69) without prejudice.

SO ORDERED.

/s/ Joseph L. Tauro  
JOSEPH L. TAURO  
UNITED STATES DISTRICT JUDGE

DATED: June 25, 2007

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<sup>3</sup>For purposes of the filing deadline, the Court will consider that Plaintiff has filed his pleading upon mailing from the prison.

<sup>4</sup>See Torres-Vargas v. Pereira, 431 F. 3d 389, 393 (1<sup>st</sup> Cir. 2005)("Where... the court appropriately forewarns a plaintiff of the consequences of future noncompliance with an unambiguous order, the court need not exhaust less toxic sanctions before dismissing a case with prejudice"); Rosario-Diaz v. Gonzalez, 140 F.3d 312, 315 (1<sup>st</sup> Cir. 1998). See also Benitez-Garcia v. Gonzalez-Vera, 468 F.3d 1,4 (1<sup>st</sup> Cir. 2006)(except for contempt, dismissal is the harshest sanction).